No. 104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

PARMELEE TRANSPORTATION CO.,

Appellant,

vs.

THE ATCHISON TOPEKA AND SANTA FE RAILWAY CO., et al.,

Appellees.

Appeal from the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PARMELEE TRANSPORTATION COMPANY.

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SUBJECT INDEX

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 906

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REPLY BRIEF OF PARMELEE TRANSPORTATION COMPANY.

I.

APPELLANT HAS STANDING TO APPEAL.

Appellees' suggestion that appellant has no standing to appeal is without merit. The appellant is engaged in the transfer business in the City of Chicago and is licensed by the City of Chicago to engage in that business. The appellee Transfer is engaged in the transfer business in the City of Chicago but has not secured, or indeed applied for, a license from the City of Chicago to engage in that business. We submit that this establishes a right of the appellant to maintain this appeal.

has not applied for license under the ordinance. The amended ordinance must be construed as a whole. *People* v. *Boykin*, 298 Ill. 11, 20, 131 N. E. 133, 136 (1921). The licensing sanction permeates the whole of the regulatory scheme established by the ordinance. Thus, section 28-4 requires safety inspection before a license is issued; section 28-5 requires the filing of certain information as a prerequisite to the grant of a license; section 28-6 requires the commissioner in the exercise of the licensing function to make determinations concerning the character and financial reliability of the operator; section 28-12 requires a determination of financial responsibility; section 28-14 provides for suspension of the license of a vehicle which becomes unsafe for operation. Yet the Court of Appeals held that the City ". . . has no power, directly or indirectly, to designate who shall own or operate such vehicles." (Statement as to Jurisdiction, p. 28a.) According to the Court of Appeals, only the Terminal Lines may decide who shall perform terminal transfer services in the City of Chicago: "The city is not equipped to function effectively in this area. It follows that the choice as to the instrumentality to be used for that purpose properly belongs to the Terminal Lines. These facts preclude the selection of an operator of terminal vehicles by anyone other than the Terminal Lines." (Statement as to Jurisdiction, p. 27a.) This, it seems to us, is a clear enough declaration that the governmental power to determine, for example, whether the operator's character and financial responsibility are such as to assure adequate protection to the public is lodged not in the City of Chicago by the ordinance but in a group of private railroad corporations by a Federal court.

Whether the Court of Appeals meant to strike down all licensing provisions of the ordinance, or all those permitting the discretionary withholding of a license, or all

those permitting the withholding of a license on grounds relating to the identity and circumstances of the applicant, or only those contained in section 28-31.1, we do not know. It may be that the court was assuming the legislative function of striking out the "1955 amendment" and restoring the "prior ordinance." (Statement as to Jurisdiction, p. 31a.) It is not important to find the answers for present purposes. For, whatever may be the full sweep of the decision, it unquestionably and as a minimum denies to the City of Chicago the right to employ the licensing sanction, as provided in section 28-31.1, even on the basis of considerations which are not "economic" but which relate solely to public safety and welfare and to the preservation and maintenance of the city streets. That the City possesses such power and that the Court of Appeals has erroneously denied it that power is amply demonstrated in the Statement as to Jurisdiction and in the alternate Petition for Certiorari.

III.

THE INTERSTATE COMMERCE ACT DOES NOT PRECLUDE THE APPLICATION OF THE ORDINANCE TO THE ACTIVITIES OF TRANSFER.

In part 5 of the Motion to Dismiss or Affirm, the appellees frivolously suggest that appellants have conceded that section 202(c)(2) of the Interstate Commerce Act, 49 U. S. C. sec. 302(c)(2), precludes the application of the ordinance in issue to the activities of Transfer. A quick glance at the first of the Questions Presented to this Court (Statement as to Jurisdiction p. 3) demonstrates that we have properly raised this question. Appellees would require that we specifically negate in the questions presented each statement made in the lower court's opinion. No Rule of this Court requires us to do so.

1. *Transfer is specifically exempted from Part II of the Interstate Commerce Act.*

Section 202(c) of the Interstate Commerce Act provides:

> "Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment shall not apply— * * * (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to Part I, . . . in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier . . : as part of, and shall be regulated in the same manner as, the transportation by railroad . . . ." (49 U. S. C. sec. 302 (c) (2).)

While this exemption from Part II does not include exemption by its terms from section 204, the Motor Carrier Safety Regulations promulgated by the Commission pursuant to Section 204 clearly preserve the city's police power exercised in the Chicago Public Passenger Vehicle Code. Regulation 190.33 (49 C.F.R. sec. 190.33) provides that the federal safety regulations, with the exception of maximum hours of employment, shall not apply to "vehicles and drivers used wholly within a municipality or the commercial zone thereof," unless the vehicle is carrying explosives. Regulation 190.30 (49 C. F. R. sec. 190.30) goes further to assure the preservation of local control, providing:

> "Except as otherwise specifically indicated, Parts 190-197 of this subchapter are not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the

compliance with which would not prevent full compliance with these regulations by the persons subject thereto."

Thus, in the single area under Part II in which the federal government has exercised powers relevant to the operations of Transfer, safety and maximum hours of employment, the Interstate Commerce Commission specifically recognizes the need for local control over safety; and the Chicago Public Passenger Vehicle Code does not deal with the maximum hours of employment. Obviously there is no conflict between local and federal authority here.

2. *Transfer cannot secure a certificate of convenience and necessity from the Interstate Commerce Commission.*

The Interstate Commerce Commission has made it abundantly clear that the operations engaged in by Transfer could not be certified under Part II of the Interstate Commerce Act as a motor carrier. *Scott Bros., Inc., Collection and Delivery Service*, 4 M. C. C. 551 (1938); *Status of Parmelee Transportation Co.*, 288 I. C. C. 95 (1953); *Michigan Cab Co., Inc.*, 7 M. C. C. 701 (1938). *Cf. Cederblade* v. *Parmelee Transportation Co.*, 166 F. 2d 554, 555 (C.A. 7, 1948).

3. *There is no conflict between the Chicago Public Passenger Vehicle Code and the federal control exercised by the Interstate Commerce Commission under Part I of the Interstate Commerce Act.*

We need not here quarrel with the suggestion that the Interstate Commerce Commission could compel the railroads to offer interstation transfer service. The fact is that the Commerce Commission has taken no action of that sort. Indeed, not once in the three courts in which this

case has now been considered has there been any evidenc
of any action by the Interstate Commerce Commission re
lating to such service.

We respectfully submit that the judgment of the Cour
of Appeals should be reversed.

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